From: Andrew S. Gardner
To: Microsoft ATR
Date: 1/26/02 5:55pm
Subject: Microsoft Settlement

To whom it may concern, Pursuant to the Tunney Act I am writing you to comment on the proposed settlement in the Microsoft anti-trust litigation.

The proposed settlement is inadequate. The settlement creates the appearance of regulatory action to curtail Microsoft's behavior, but it is only the appearance.

Consider the example of AT&T. At the time that AT&T was first laying the copper cable to permit long distance phone service in the US, the cost of doing so was extraordinary. If AT&T had been forced to split the then small market for interstate and intrastate long distance, the cost of providing the service would have been far greater than any potential revenue. Seeking to first serve the interests of American citizens, government on all levels sanctioned AT&T's monopolistic position in the market, and permitted AT&T to use its monopoly position to maintain market stability.

At the time the AT&T anti-trust action began, the market conditions that necesitated permitting monopolistic behavior and its mandatory side effects had disappeared. Seeking again to protect the interests of American citizens, the federal government began the process of permitting competition in the local, interlata, and interstate call markets. The fruits of that action, while certainly detrimental to AT&T at the time, can be seen in the plethora of long distance service providers and the dramatic reduction in the prices of those services.

It could be argued that at the time of the birth of the computer industry that it was in the best interests of the industry for its resources to be concentrated. Without regulation or other federal action, Microsoft concentrated and then abused its power, which is, of course, a question of law answered in this case's judgment.

I believe that the current settlement demonstrates the belief that Microsoft's case is fundamentally different from the case of AT&T. I would argue that they are identical. AT&T provided a service that most Americans consider nearly fundamental. The case against AT&T demonstrated that as much as we might admire or appreciate the products or people of a particular company, the remedies we seek in anti-trust actions must actually remedy the situation.

First, the proposed remedy sets a dangerous precedent about the regulation of the software industry. Because no case exists in a vacuum, we must consider the fact that the implementation of behavioral remedies on Microsoft necessitates the construction of governmental oversight of the software industry as a whole, which has grown incredibly without government interference. We must also consider the precedent we set in beginning the regulation of the software industry.

Second, the proposed remedy does not actually remedy the situation. At its most fundamental level, the case against Microsoft as brought by the Justice Department alleged that Microsoft leveraged its position in adjacent but not coincident fields of computing to systematically destroy its competition. Behavioral requirements on Microsoft do no remedy Microsoft's ability to control the industry.

Consider the "behavior modification" approach in the AT&T case. Had AT&T not be forced to divest itself of its local carriers and been forced to permit competition in long distance, we would not have

competitive local or long distance service. While AT&T might have been a cuddly 800 pound gorilla, it still would be an 800 pound gorilla.

To assume that any remedy that does not seperate distinct business units within Microsoft into seperate corporate entities with requirments about lowering the barriers to entry of competitors is foolish.

Thank you for your time,

Andrew Gardner

--

Andrew S. Gardner
andrew@lanefour.org
520-990-5953 - Tucson, AZ
